

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 PAUL CATANO MURRAY, SR.,

No. 2:21-cv-0214 KJN P

12 Plaintiff,

13 v.

14 B. HOLMES, et al.,

ORDER

15 Defendants.
16

17 Plaintiff is a state prisoner, proceeding without counsel. Plaintiff seeks relief pursuant to
18 42 U.S.C. § 1983, and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.
19 This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

20 Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a).
21 Accordingly, the request to proceed in forma pauperis is granted.

22 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C.
23 §§ 1914(a), 1915(b)(1). By this order, plaintiff is assessed an initial partial filing fee in
24 accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct
25 the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and
26 forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly
27 payments of twenty percent of the preceding month's income credited to plaintiff's prison trust
28 account. These payments will be forwarded by the appropriate agency to the Clerk of the Court

1 each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28
2 U.S.C. § 1915(b)(2).

3 Screening Standards

4 The court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
6 court must dismiss a complaint or portion thereof if the prisoner raised claims that are legally
7 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
8 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

9 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
11 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
12 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
13 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
14 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
15 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
16 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
17 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
18 1227.

19 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
20 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
23 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
24 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
25 sufficient "to raise a right to relief above the speculative level." Id. However, "[s]pecific facts
26 are not necessary; the statement [of facts] need only 'give the defendant fair notice of what the . .
27 . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007)
28 (quoting Bell Atlantic Corp., 550 U.S. at 555) (citations and internal quotations marks omitted).

1 In reviewing a complaint under this standard, the court must accept as true the allegations of the
2 complaint in question, id., and construe the pleading in the light most favorable to the plaintiff.
3 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468
4 U.S. 183 (1984).

5 The Civil Rights Act

6 The Civil Rights Act under which this action was filed provides as follows:

7 Every person who, under color of [state law] . . . subjects, or causes
8 to be subjected, any citizen of the United States . . . to the
9 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

10 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
11 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
12 Monell v. Department of Social Servs., 436 U.S. 658 (1978) (“Congress did not intend § 1983
13 liability to attach where . . . causation [is] absent.”); Rizzo v. Goode, 423 U.S. 362 (1976) (no
14 affirmative link between the incidents of police misconduct and the adoption of any plan or policy
15 demonstrating their authorization or approval of such misconduct). “A person ‘subjects’ another
16 to the deprivation of a constitutional right, within the meaning of § 1983, if he does an
17 affirmative act, participates in another’s affirmative acts or omits to perform an act which he is
18 legally required to do that causes the deprivation of which complaint is made.” Johnson v. Duffy,
19 588 F.2d 740, 743 (9th Cir. 1978).

20 Plaintiff’s Allegations

21 In his first claim, plaintiff alleges that despite his preexisting health conditions, defendant
22 B. Holmes failed to take reasonable measures to protect plaintiff from the risk of Covid-19 in
23 violation of the Eighth Amendment. In his second claim, plaintiff contends that defendant
24 Holmes violated plaintiff’s right to express his gender identity by referring to plaintiff using
25 female pronouns rather than male pronouns in Holmes’ response to plaintiff’s grievance. In his
26 third claim, plaintiff alleges that after bringing to the attention of the office of appeals that one of
27 their employees was being disrespectful by addressing plaintiff using female pronouns instead of
28 male pronouns, the office of appeals intentionally ignored staff misconduct, violating “respect of

1 others.” (ECF No. 1 at 5.) The office of appeals also failed to respond to plaintiff’s claims
2 concerning exposure to Covid risk. Plaintiff seeks money damages.

3 Plaintiff names as defendants B. Holmes, CDW, at Mule Creek State Prison, and the
4 CDCR Office of Appeal in Sacramento.

5 Discussion

6 The court reviewed plaintiff’s complaint and, for the limited purposes of § 1915A
7 screening, finds that claim one states a potentially cognizable claim against defendant Holmes for
8 the alleged violation of plaintiff’s Eighth Amendment rights. See 28 U.S.C. § 1915A.

9 For the reasons stated below, the court finds that claims two and three do not state
10 cognizable claims. Claims two and three are dismissed with leave to amend.

11 In claim two, plaintiff’s allegations are insufficient to demonstrate a constitutional
12 violation. Plaintiff fails to demonstrate that defendant’s use of the wrong pronouns in one appeal
13 response, without more, constitutes a violation of plaintiff’s constitutional rights.

14 As to claim three, the office of appeals is not a person under 42 U.S.C. § 1983 and
15 therefore cannot be named as a defendant. In addition, plaintiff identifies no constitutional
16 violation in his third claim. The mere ignoring of a complaint, without more, fails to demonstrate
17 a constitutional violation. Moreover, plaintiff cannot state a due process claim based on a
18 defendant’s role in the inmate appeal process. The Due Process Clause protects plaintiff against
19 the deprivation of liberty without the procedural protections to which he is entitled under the law.
20 Wilkinson v. Austin, 545 U.S. 209, 221 (2005). However, plaintiff has no stand-alone due
21 process rights related to the administrative grievance process itself. Ramirez v. Galaza, 334 F.3d
22 850, 860 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). A prison official’s
23 denial of a grievance does not itself violate the constitution. Evans v. Skolnik, 637 F. App’x 285,
24 288 (9th Cir. 2015). Thus, the denial, rejection, or cancellation of a grievance does not constitute
25 a due process violation. See, e.g., Wright v. Shannon, 2010 WL 445203, at *5 (E.D. Cal. 2010)
26 (plaintiff’s allegations that prison officials denied or ignored his inmate appeals failed to state a
27 cognizable claim under the First Amendment); Williams v. Cate, 2009 WL 3789597, at *6 (E.D.
28 Cal. 2009) (“Plaintiff has no protected liberty interest in the vindication of his administrative

claims.”). “Because there is no right to any particular grievance process, it is impossible for due process to have been violated by ignoring or failing to properly process prison grievances.”

Daniels v. Aguillera, 2018 WL 1763311 (E.D. Cal. Apr. 12, 2018).

Plaintiff’s Options

Plaintiff may proceed forthwith to serve defendant Holmes and pursue claim one against defendant Holmes or plaintiff may delay serving defendant Holmes and attempt to state cognizable claims based on his allegations in claims two and three.

If plaintiff elects to attempt to amend his complaint to state additional cognizable claims, he has thirty days in which to do so. He is not obligated to amend his complaint.

If plaintiff elects to proceed forthwith as to claim one against defendant Holmes, against whom he stated a potentially cognizable claim for relief, then within thirty days plaintiff must so respond on the appended notice. In this event the court will construe plaintiff’s election as consent to dismiss claims two and three without prejudice.

Plaintiff is advised that in an amended complaint he must clearly identify each defendant and the action that defendant took that violated his constitutional rights. The court is not required to review exhibits to determine what plaintiff’s charging allegations are as to each named defendant. The charging allegations must be set forth in the amended complaint so defendants have fair notice of the claims plaintiff is presenting.

Any amended complaint must show the federal court has jurisdiction, the action is brought in the right place, and plaintiff is entitled to relief if plaintiff’s allegations are true. It must contain a request for particular relief. Plaintiff must identify as a defendant only persons who personally participated in a substantial way in depriving plaintiff of a federal constitutional right. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a constitutional right if he does an act, participates in another’s act or omits to perform an act he is legally required to do that causes the alleged deprivation). If plaintiff contends he was the victim of a conspiracy, he must identify the participants and allege their agreement to deprive him of a specific federal constitutional right.

In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed.

1 R. Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant. Fed.
2 R. Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or
3 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

4 A district court must construe a pro se pleading “liberally” to determine if it states a claim
5 and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an
6 opportunity to cure them. See Lopez, 203 F.3d at 1130-31. While detailed factual allegations are
7 not required, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
8 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
9 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual
10 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft, 556
11 U.S. at 678 (quoting Bell Atlantic Corp., 550 U.S. at 570).

12 A claim has facial plausibility when the plaintiff pleads factual
13 content that allows the court to draw the reasonable inference that
14 the defendant is liable for the misconduct alleged. The plausibility
15 standard is not akin to a “probability requirement,” but it asks for
16 more than a sheer possibility that a defendant has acted unlawfully.
Where a complaint pleads facts that are merely consistent with a
defendant’s liability, it stops short of the line between possibility
and plausibility of entitlement to relief.

17 Ashcroft, 556 U.S. at 678 (citations and quotation marks omitted). Although legal conclusions
18 can provide the framework of a complaint, they must be supported by factual allegations, and are
19 not entitled to the assumption of truth. Id. at 1950.

20 An amended complaint must be complete in itself without reference to any prior pleading.
21 Local Rule 220; See Ramirez v. County of San Bernardino, 806 F.3d 1002, 1008 (9th Cir. 2015)
22 (“an ‘amended complaint supersedes the original, the latter being treated thereafter as non-
23 existent.’” (internal citation omitted)). Once plaintiff files an amended complaint, the original
24 pleading is superseded.

25 Accordingly, IT IS HEREBY ORDERED that:

26 1. Plaintiff’s request for leave to proceed in forma pauperis is granted.

27 ///

28 ///

1 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
2 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
3 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
4 Director of the California Department of Corrections and Rehabilitation filed concurrently
5 herewith.


6 3. Claims two and three are dismissed with leave to amend. Within thirty days of service
7 of this order, plaintiff may amend his complaint to attempt to state cognizable claims against
8 these defendants. Plaintiff is not obliged to amend his complaint.

9 4. The allegations in the pleading are sufficient to state a potentially cognizable claim
10 against defendant Holmes as to claim one. See 28 U.S.C. § 1915A. Within thirty days of service
11 of this order plaintiff may return the attached Notice of Election. If plaintiff elects to proceed
12 solely as to defendant Holmes as to claim one, the court will order service of process by the
13 United States Marshal pursuant to Fed. R. Civ. P. 4. Defendant Holmes will be required to
14 respond to plaintiff's allegations within the deadlines stated in Fed. R. Civ. P. 12(a)(1). In this
15 event, the court will construe plaintiff's election to proceed forthwith as consent to an order
16 dismissing his defective claims two and three without prejudice.

17 5. Failure to comply with this order will result in a recommendation that this action be
18 dismissed.

19 Dated: May 27, 2021

20
21 /cw/murr0214.14o


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11

12 PAUL CATONO MURRAY, SR.,

No. 2:21-cv-0214 KJN P

13 Plaintiff,

14 v.

NOTICE OF ELECTION

15 B. HOLMES, et al.,

16 Defendants.
17

18 In compliance with the court's order filed _____, plaintiff elects to proceed
19 as follows:

20 _____ Plaintiff elects to proceed solely as to claim one against defendant Holmes.

21 _____ Plaintiff consents to the dismissal of claims two and three, without prejudice.

22 **OR**

23 _____ Plaintiff opts to file an amended complaint and delay service of process.
24

25 DATED:
26

27 _____
Plaintiff
28